IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NOS.1038/2004
With
SPECIAL CIVIL APPLICATION NOS.5663, 2933, 4469, 4471, 2830, 2912, 4049, 8408, 5823, 6330, 9073, 9090, 11648, 13599, 13600, 13601 AND 13602 OF 2004

HON'BLE MR.JUSTICE K.S.JHAVERI

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HINDUSTAN PETROLEUM CORPN. LTD
Versus
GUJARAT ELECTRICITY BOARD

Appearance:

Mr. G.N. Shah, Mr. M.I. Hava, Mr. Manish R. Bhatt, Mr. K.B. Naik and Mr.G.M. Joshi for the petitioners.

Ms Lilu Bhaya for the respondent Board.

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI
Date of decision: 17/12/2004

CAV JUDGEMENT

1.0 A common question of law and facts is involved in all these petitions and therefore all the petitions are considered together and decided by this common judgement.

2.0 The petitioners herein are consumers of Gujarat Electricity Board. They are High Tension Consumers and they have been charged on the basis of tariff applicable to them as HT consumers.

2.1 According to the petitioners, the respondent Board issued exhorbitant supplementary bills to the petitioners being differential amount due to revision of tariff on account of change of classification from HTP-I to HTP-II(A). The petitioners were also informed that although original connection was released under HTP-I category, considering the activities carried out by the petitioners in their units, their units would fall under HTP-II(A) category. It appears that the new tariff was introduced with effect from 10.10.2000 and the special bill has been calculated on the basis of new tariff. Therefore, the petitioners herein have challenged the special bills issued to them, the action of arbitrarily changing the classification from HTP-I to HTP-II(A) and the demand of new tariff with retrospective effect.

3.0 Mr. G.N. Shah, learned counsel for some of the petitioners advanced the following arguments:

3.1 The Electricity Act, 2003 (hereinafter referred to as the Act) was brought into force by Central Government Notification dated 10th June 2003. Section 172(d) of the said Act authorizes a State Government to declare that the said Act shall not apply in the State for such period not exceeding six months from the appointed day i.e. 10th June 2003. The Gujarat Government, by its notification dated 4th July 2003, declared that the provisions of the Act shall not apply to the State for a period of six months and therefore the provisions of the Act became applicable in the State of Gujarat from 10th June 2003. By separate notification dated 10th June 2004 the State Government authorized the respondent Board to continue to function as a licensee for a further period of six months from 9th June 2004. He submitted that under section 172(a), the Board has to function from 10th December 2003 as a licensee in accordance with the provisions of 2003 Act because under the proviso to section 172 it is merely the extension of the period for the Board to continue as a licensee. The proviso does not exempt the Board from the provisions of the Act which became applicable to the State on 10th

December 2003. In that view of the matter from 10th December 2003 the provisions and the limitation from the date from which the demand is made by the Board of two years contained in section 56 of the Act became applicable to the respondent Board.

3.2 Section 56 provides that if a person neglects to pay any charge for electricity or any sum other than a charge for electricity, then 15 clear days' notice has to be given and only thereafter the supply of electricity could be disconnected. As far as the present case is concerned, the amount claimed by the respondent Board is for differential amount in respect of electricity charge supplied from October 2000 to October 2003. The demand notice is issued in the year 2004. The petitioners have been making payment of regular electricity bill. Therefore, the contention on behalf of the petitioners is that Section 56 cannot be invoked for disconnection of electricity after 10.12.2003 as the limitation of 2 years applies in the present case to GEB.

3.3 The counsel for the petitioners submitted that an agreement has been signed between the petitioners and the Board after 3.3.1989 after the Board's Resolution dated 3.3.1989 of HPC on 3.3.1989 for the supply of electricity of 150 KVA (contract demand). This contract has been implemented by the Board and the petitioners, without any dispute, have paid all the charges to GEB as per their bills for the amounts charged. He further submitted that the respondent Board had never contended for 15 years during the currency of the Agreement that there was a mistake in entering into the contract with the petitioners. The respondent Board has not even pleaded in the reply that there was a mistake in the contract.

3.4 The counsel for the petitioners contended that the Board had not given any opportunity of hearing to the petitioners and the demand for differential duty is in violation of principles of natural justice and fair play.

3.5 According to learned counsel, the Indian Electricity Act, 1910 stood repealed from 10.12.2003 when the 2003 Act was brought into force by the State of Gujarat. Therefore notice issued by the Board under section 24 of the repealed Act is illegal and unsustainable.

3.6 Mr. Shah lastly contended that Section 86 of the 2003 Act defines the functions of the State Commission and it does not permit State Commission to consider disputes between a consumer and the respondent Board. He

further submitted that the present term of the State Commission will expire on 9.12.2004 and in the meantime the State Commission is expected to discharge the functions provided in Section 86.

4.0 Mr. M.I. Hava, learned counsel for some of the petitioners submitted that the Board has no power to classify or re-classify the tariff schedule and the power is vested only in the State Commission under section 22 and section 29 of the Electricity Regulatory Commission Act,1998 read with section 86 of Electricity Act, 2003 and Regulation 78 of the Regulation framed by the Commission.

4.1 He submitted that as held in the case of Mardia Chemicals Ltd. Vs. Gujarat Electricity Board, reported in 2002(2) GLR 1947, once the Tariff order is made by the Commission, the Board is bound by such tariff order and it remains in force unless it is amended by the Commission. He contended that the Board cannot charge its customers any tariff for supply of electricity in a manner different from the tariff approved by the Commission under its tariff order.

4.2 Mr. Hava further submitted that under Commission's order dated October 2000 the petitioners squarely fall under HTP-I and were all along charged Tariff thereunder. The Board has not approached the Commission under section 64 for modification, amendment or revision of the classification and the Commission has not passed any order, and therefore the the action of the Board in suo motu revising or changing the classification is bad and illegal.

5.0 Mr. M.R. Bhatt, learned counsel for some of the petitioners contended that the petitioner has been billed as per HTP-I tariff upto August 2003 in view of the agreement between the petitioner and the respondent Board and the impugned bill is raised for the first time demanding revised tariff from the date of initial energy connection which cannot be done by respondent Board. According to him even as per the Commission's order the petitioner would be an Industrial Undertaking carrying out manufacturing activity. This view is taken by the Commission in its decision in the case of Sabic Laboratory, wherein it is held that HTP II is for hotels, amusement park, etc. and similar consumers. The petitioner establishment is registered under the Factories Act and as per section 2(k), manufacturing process means any process for pumping oil.

5.1 In support of his contention Mr. Bhatt has relied upon decisions (a) in the case of M/s Andhra Steel Corpn. Ltd. Vs.A.P.S.E. Board, reported in AIR 1991 SC 2222 wherein it is held that pumping is part of entire process and integral part of manufacturing activity, (b) in the case of Empire Industries Ltd. Vs. Union of India, reported in AIR 1986 SC 662, wherein it is held that the process of bleaching amounts to manufacturing activity, (c) in the case of Gramophone Co. of India Ltd. Vs. Collector of Customs, Calcutta, reported in (2000)1 SCC 549 wherein it is held that making of Blank audiocassette vis-`-vis recorded cassette amounts to manufacturing activity, and (d) in the case of G.L. Hotels Limited Vs. T.C. Sarin, reported in (1993)4 SCC 363 the view taken is that even kitchen in a hotel has to be treated as factory since connected activity has to be seen as a whole.

5.2 Mr. Bhatt has also contented that GEB, being the licensee, cannot determine tariff and that in view of the language used in section 24 of the old Act the amount "due" has to refer to the period of filing suit and therefore notice was issued beyond the period of limitation.

6.0 Mr. K.B. Naik, for M/s Trivedi & Gupta learned counsel for the petitioners advanced the following submissions:

6.1 The action of the respondent Board unilaterally changing the classification from HTP-I to HTP-II(A) has been taken without notice and hearing and therefore the same is against the principles of natural justice. In this context he has relied upon the decisions reported in the case of Haji Abdul Shakoor & Co. Vs. Union of India reported in AIR 2002 SC 2423, and in the case of Mohinder Singh Vs. Chief Election Commr reported in AIR 1978 SC 851.

6.2 Learned counsel for the petitioners contended that the respondent Board has sought to effect the change in classification retrospectively against the well-settled legal principles of law that no action or an order can be given retrospective effect in any circumstance. To support this contention he has relied upon the decision in the case of State of Orissa Vs. Mangalam Timber Products Ltd., reported in (2004)1 SCC 139 wherein it is held that when the Government seeking to revise the terms of the contract, effective from a back date, to the detriment of the respondent, promissory estoppel is applicable.

6.3 According to the learned counsel the respondent Board has not communicated at any point of time that they propose to effect the change in classification and directly an order was communicated to the petitioners effecting the change in the classification. According to him the respondents have relied upon directives of its Head Office at Baroda, but such direction was neither supplied to the petitioners nor it is produced on the record of the petitions.

6.4 Learned counsel for the petitioners submitted that the respondent has neither terminated nor even amended the contract after following the procedure and in accordance with law, which clearly provided that the units in question would be charged as per the applicable tariff for HTP-I class. Therefore, without change in the agreement the respondents are not entitled to charge the tariff for HTP-II(A).

7.0 Mr. Gautam Joshi appearing for some of the petitioners submitted that no opportunity of hearing to the petitioners is given and no decision of the Head Office is placed on record. He submitted that he adopts the submissions already made by Advocates for petitioners to avoid repetition.

8.0 In support of his contentions, leanred counsel for the petitioners relied upon the following decisions:

8.1 In the case of Mardia Chemicals Ltd. Vs. Gujarat Electricity Board, reported in 2002(2) GLR 1947 this Court has held that the Gujarat Electricity Regulatory Commission has no jurisdiction to adjudicate upon the dispute. In para 10.2 this Court held as under:

> "10.2 Section 29 again emphasizes the nature of the function of the State Commission, which is determination of tariff, inter alia, for supply of electricity including retail supply. It enjoins a duty on the State Commission to determine the tariff in accordance with the provisions of the Act. Sub-section (2) of Sec.29 lays down the guidelines on the basis of which the Commission shall determine by regulations the terms and conditions for the fixation of tariff. These guidelines for making regulations laying down terms and conditions for the fixation of tariff require factors mentioned therein to be taken into account by the Commission while determining the tariff. The general guidelines

that the factors which would encourage efficiency, economical use of resources, good performance as well as interest, of consumers should be taken into account, as provided in clauses (d) and (e), cannot be read to spell out any power of the Commission to adjudicate upon the disputes between the consumer and the Board. Even if the Commission may have power under section 29(3), which expects it not to show any undue preference to any consumer of electricity, but enables the Commission to differentiate according to the consumers' load factor, power factor, total consumption of electricity during any specified period, etc., those are the matters having bearing on fixation of tariff and they have nothing to do with the adjudication of any dispute that may arise between the consumer and the Board, when on the basis of the revised tariffs, the dues are sought to be recovered and action taken for their non-payment, as contemplated by Sec.24(1) of the Electricity Act, 1910."

Para 14 of the said decision reads as under:

"14. As per Regulation 78 of the Regulations of 1999, as noted above, the Board cannot charge its customers any tariff for supply of electricity without the general or specific approval of such tariff by the Commission, and that the Board has to evolve tariff proposals as envisaged by Regulation 84 and the tariff determined by the Commission and published as per the Rules would remain in force until any amendment is approved by the Commission and published as provided under Regulation 88 of the Regulations."

8.2 In the case of M.S.E. Board Vs. M/s Madhusudandas, reported in AIR 1966 Bombay 160 it is held as under:

"The defendant had entered into an agreement to take the supply and the plaintiff had agreed to supply the electrical energy for a period of five years. No doubt, the agreement which prescribed the rates showed that the rates were flexible in the sense that they were payable according to the tariff fixed by the licensee from time to time. Even so, when the system of charging was changed by the new tariff, the defendant could honestly

believe that the plaintiff would not be entitled to charge according to the new tariffs. In view of the bona fide dispute between the parties the plaintiff was not justified in cutting off the electric supply."

8.3 In the case of Orissa Fibre Vs.Orissa State Electricity Board, reported in AIR 1973 Orissa 104 it is held that when there is a bona fide dispute raised by the consumer as to the amount payable, it cannot be said that he has neglected to pay the dues. In such a case action under section 24(1) cannot be taken.

8.4 In the case of Hindustan Aluminium Corporation Ltd. Vs. The U.P. State Electricity Board, reported in AIR 1973 Allahabad 263, it is held as under:

"Applying this principle to Section 24 of the Electricity Act, no reasonable consumer would be expected to pay an amount which he bona fide disputes with the supplying company. In the present case, the petitioner has disputed the demands made by the Board. It has not been shown that the disputes raised are not bona fide and are not reasonable, and that being so it cannot be said that the petitioner has neglected to pay the demands. Moreover in case the disputes raised by the petitioner were frivolous or baseless, the Board would be the last person willing to make the proposal to refer the disputes to the arbitration of successive Ex Chief Justices of India."

8.5 In the case of Bajrang Tea Mfg. Company (Pvt) Ltd. Vs. Assam S.E.B., reported in AIR 1991 Gauhati 42 it is held that for retrospective revision in electricity tariff can be done only with proper and cogent reasons. In Para 42A and 42B it is held as under:

"...In each case when taxes are imposed retrospectively proper and cogent grounds as held by the apex court must be given and the levy with retrospectively must be justified.

42B. We see in the facts the Government nor the Board in their counters in opposition gave no reasons as to why with retrospective effect tariff revision is enforced instead the two have been contending there was no retrospectively when tariff is enforced from July 1, 1986.

8.6 In the case of Sehjiv Kumar Tandon Vs. Delhi Electric Supply Undertaking, reported in AIR 1994 Delhi 202 it is held as under:

> "... Since the respondent has not complied with statutory requirement of serving show cause notice before disconnecting the electricity, to my mind, this is a clear violation of law, coupled with the fact that theft and misuse have yet not been proved, the court below could not have imposed any condition while directing the respondent or restore the electricity 1 KW. As regard the revised demand raised the same on the face of it is doubtful and yet to be determined, hence for this reason also no condition could be imposed."

8.7 In the case of Dumraon Textiles Limited Vs. Bihar State Electricity Board, reported in AIR 1995 Patna 43 it is held as under:

> "19. The Board being a public authority discharge Governmental function. A consumer depends upon the authorities of the Board for its day to day amenities which are essential for human existence. It is the State within the meaning of Article 12 of the Constitution of India. It thus require to act principles of natural justice. Its act thus must be fair and conform to the standards of public morality. Its officers cannot act arbitrarily or raise demand for substantial amount of money without affording opportunity of hearing to the consumer."

9.0 Ms Lilu Bhaya, learned counsel for the respondent Board has made the following submissions:

9.1 That right from the year 1987 i.e. from the date of connection the petitioners are required to be charged as per the tariff rate HTP-II(A). She placed reliance upon the tariff booklet published by the respondent Board in the year 1987 wherein the rate HTP-II(A) has been classified wherein it is shown that H.T.Consumers having contracted load of 500 KVA and above are requiring power supply for the purposes mentioned therein and will be classified in HTP-II(A). She submitted that even in the booklet published in the year 1990 also, the same rate has been mentioned.

9.2 That after coming into force of the Electricity Regulatory Commissions Act, 1998, the powers to frame

tariff and to decide tariff is with the Commission under section 29 of the said Act. Accordingly the Commission has decided the tariff vide its orders dated 10.10.2000 and 22.12.2000. According to the learned counsel, the Commission has, while passing the said orders, also confirmed the classification which was done earlier by the respondent Board keeping in HTP-I, only those H.T. consumers who have contracted load of 100 KVA and less and who are engaged in manufacturing activities and classifying all other H.T. consumers with contract load of 100 KVA and above in HTP-II(A). She submitted that pursuant to the aforesaid orders of fixing tariff the respondent Board has published tariff booklet in the year 2001 and in the said booklet vide Clause 11 the rate of HTP-II(A) has been mentioned. The classification of tariff HTP-I and HTP-II is the same since the year 1987. Only the tariff rates have been revised from time to time either by the Board or by the Commission as the case may be.

9.3 That the Government of Gujarat has extended the application of the Electricity Act, 2003 by issuing a notification declaring that the provisions of the Electricity Act, 2003 shall not apply to State of Gujarat for a period of six months and therefore the Act did not commence till 10.12.2003. She further submitted that the respondent Board would be licensee governed by the repealed laws for a period of one year from 10.12.2003 and the provisions of the Electricity Act, 2003 are not applicable in the present case.

9.4 That as per the provisions of the Regulatory Commissions Act and the Electricity Act, 2003 it becomes clear that power to determine tariff was with the State Commission. It is the State Commission which determines what tariff should be charged by the licensee to the consumers. Determination of tariff and classes of consumers to which tariff applied had to be determined by the State Commission and its decision in that regard was final. In other words, respondent no.1 who is a licensee is bound by the decision of the State Commission in regard to the tariff. Any modification or change in the tariff determined by the State Commission can be made only by the State Commission and not by the Board or any other Authority. Therefore if a question is raised as to whether the tariff applied by the respondent no.1 is correct or not, a consumer had to approach the State Commission.

9.5 According to her, the provisions of Regulatory Commission's Act and Gujarat Electricity Industry

(Reorganisation and Regulation) make it clear that the decisions and orders rendered by the State Commission shall be valid and binding to all concerned including respondent no.1 and the petitioners. Therefore all the decisions of the State Commission relating to tariff including HTP-I and HTP-II(A) and HTP-II(B) would continue to hold the field and they would be binding to all concerned including petitioners who are consumers. She submitted that so far as power of State Commission to determine tariff is concerned, there is no difference after coming into force of the Reorganization Act. This power continues to vest in the State Commission. Therefore, if any variation or modification with regard to tariff is sought to be made, the consumer has to approach the State Commission.

9.6 Ms Bhaya submitted that even under the New Act section 172(b) empowers the Board to Act whatever action has been taken by the Board under the Old Act any approval, clearance, permission granted under the old Act for one year will continue to operate as if repealed law was in force. Therefore the decision taken by the Board on 6.1.2004 is as per the tariff and the aforesaid action is having the force of law.

9.7 According to Ms Bhaya the correct tariff applicable to the petitioners was for HTP-II(A) with effect from 10.10.2000. However, the bills which were issued to the petitioners were incorrectly issued on the basis of HTP-I. Therefore it was a mistake of law committed by the Board and it is open for the Board to correct such mistake. She submitted that for correction of such mistake, limitation will not come in the way of the respondent Board. She further submitted that during the application of powers under section 49 the Board has determined the tariff from time to time and the petitioners, from the date of getting the connection, were classified in HTP-II. They were never classified as HTP-I but inadvertently it has been shown in the agreement as HTP-I. She submitted that the correct tariff was HTP-II from the date of agreement for the petitioners. Subsequent classification is made from HTP-II to HTP-IIA and HTP-IIB in 2000.

9.8 Ms Bhaya submitted that under section 24 of the Indian Electricity Act while issuing such notice on the basis of the decision of GERC and on the basis of correction of the mistake, the Board is not required to give any further opportunity to the petitioners before issuing notice under section 24 of the Indian Electricity Act, 1910 since the question was correct application of

the tariff in view of the GERC decision and the Board had given opportunity and explained to the representatives of the petitioners. She submitted that if the petitioners have any grievance regarding either the classification or the tariff the only course open to the petitioners was to approach the GERC.

9.9 Ms Bhaya further submitted that the GERC had come to the conclusion that non-manufacturing activity carried out by the petitioners and all others who are not carrying out manufacturing activities fall within HTP-II(A).

9.10 Learned counsel for the respondent submitted that the ratio laid down in the decision of Mardia Chemicals (supra) is not applicable to the facts of the present case.

10.0 Ms Bhaya, learned counsel for the respondent relied upon a decision in the case of K.S.E.Board Vs. M/s S.N. Govinda Prabhu and others, reported in AIR 1986 SC 1999 wherein it is held that even if it is a revision of tariff by Electricity Board to generate surplus it is the mandate of the Parliament. The Board is not prevented from generating surplus as provided under section 59.

10.1 Learned counsel for the respondent relied upon a decision in the case of U.P. Electricity Board Vs. Triveni Engg. Works Ltd., reported in AIR 1996 SC 2255. She submitted that an identical issue was before the High Court and there also the contention of the petitioner was that since the aforesaid charging as per HP-II rates it was not covered under the agreement and there was also an issue that bills were charged for years as per the old tariff. She submitted that the Supreme Court has upheld that the Board is entitled to charge as per the correct tariff and the Board is empowered under section 49 of Supply Act to revise the tariff from time to time.

10.2 Ms Bhaya relied upon a decision of the Supreme Court in the case of Hyderabad Vanaspathi Ltd. Vs. A.P.State Electricity Board, reported in (1998)4 SCC 470 wherein it is observed that in absence of agreement also the terms and conditions of or supply of electricity are binding to the consumers. She therefore submitted that the submission of the petitioners that as per the agreement which shows that it is HTP-I tariff the Board is not empowered to charge as per HTP-II(A) tariff is not correct.

10.3 She has relied upon a decision in the case of Hyderabad Engg. Industries Ltd. Vs.A.P.S.E. Board, reported in 1988 SC 985 wherein it is observed that under sections 49 and 19(C) the Board has power to unilaterally alter the conditions of supply.

10.4 Ms Bhaya next relied upon a decision of the Supreme Court in the case of Fertilizers and Chemicals Travancore Ltd. Vs. K.S.E. Board, reported in AIR 1988 SC 1989 wherein it is observed that the charges of discrimination against the respondent Board are not correct. It is observed that the action of government authority must be presumed to be reasonable and in the public interest. She also relied upon a decision of the Supreme Court in the case of Bisra Stone Lime Co.Vs. O.S.E. Board, reported in AIR 1976 SC 127 wherein it is contended that the plea of discrimination which is available under Article 14 of the Constitution is not available to the petitioners.

10.5 Learned counsel for the respondent Board has relied upon a decision of the Supreme Court in the case of Raymond Ltd. Vs. M.P. Electricity Board and others, reported in (2001)1 SCC 534 wherein it is held that contract for supply of electrical energy cannot be treated at par with any other contracts of mutual rights and obligations.

10.6 She relied upon a decision of the Supreme Court in the case of BSES Ltd. Vs. Tata Power Co. Ltd. And others, reported in (2004)1 SCC 195 wherein it is held that the tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff.

10.7 Ms Bhaya submitted that pursuant to the order dated 10.10.2000 and 22.12.2000, M/s Sabic Research & Technology Pvt. Ltd. had raised the question of applicability of the correct tariff rate. The contention of the said company was that the correct tariff rate applicable to it was for HTP-I and not HTP-II(A) which was applied by the respondent. The State Commission observed that tariff rate of HTP-I was applicable only to the consumers who were engaged in the manufacturing activities. In other words, only those consumers using high tension power above 100 KVA and who were engaged in manufacturing activities were liable to pay electricity consumption charges on the basis of tariff rate HTP-I. Therefore the case of the petitioners fall under the category of HTP-II(A).

11.0 Before I proceed further, it is necessary to take note of certain relevant provisions of law as under:

11.1 Section 49 of the 2003 Act deals with agreements with respect to supply or purchase of electricity which reads as under:

'49.: Agreements with respect to supply or purchase of electricity: - Where the Appropriate Commission has allowed open access to certain consumers, under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

11.2 Section 62 of the Act lays down the criteria for determination of tariff, which reads as under:

"62. Determination of tariff - (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -

[a] supply of electricity by a generating company to a distribution licensee; provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.

[b] transmission of electricity;

[c] wheeling of electricity;

[d] retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

11.3 Section 64 deals with procedure for tariff order which reads as under:

"64. Procedure for tariff order:- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one

hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public -

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

11.4 Section 82 of the Electricity Act, 2003 prescribes Constitution of State Commission, which reads as under:

"82. Constitution of State Commission: - (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a

Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purpose of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office on the same terms and conditions on which they were appointed under those Acts:

Provided further that the Chairperson and other Members of the State Commission, appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule may, on the recommendations of the Selection Committee constituted under sub-section (1) of section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government.

(2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.

(4) The State Commission shall consist of not more than three Members, including the Chairperson.

(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in section 85.

11.5 As per Tariff for Supply of Electricity made effective from 10.10.2000 the Rate HTP-I and Rate HTP-II(A) are as under:

Rate HTP-I

This tariff will be applicable for supply of electricity to H.T. consumers contracted for 100 KVA and above for regular power supply and requiring the power. This tariff will be applicable for supply of electricity to HT supply for the purposes not specified in Rate HTP-II(A) and HTP-II(B).

Rate HTP-II(A)

Applicability: This tariff shall be applicable for supply of energy to HT consumers contracting for 100 KVA and above, requiring power supply for Railways (other than Railway Workshops chargeable under Rate HTP-I and Railway Traction), hotels, amusement parks, resorts, water parks, military installations, aerodromes, cinemas, auditoriums, banks, studios, offices, film production, etc., requiring and given separate point of supply and such other establishments as may be approved from time to time. Therefore the tariff is required to be determined as per section 62 of the Act The procedure for making a tariff order is laid down under section 64 of the Act. As per subsection (6) of section 64, a tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order. Section 86 stipulates that the State Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be within the State.

11.6 Thus, section 49 deals with agreements with respect to supply or purchase of electricity which includes tariff also. Section 62 of the Act clearly lays down the criteria for determination of tariff and the respondent Board is bound to follow the same. Section 64 deals with the procedure for tariff order by the Commission and unless amended or revoked, such tariff order shall continue to be in force for such period as may be specified in the tariff order.

11.7 Section 14 of the 2003 Act deals with grant of licence. The said sectionr reads as under:

14. Grant of licence:- The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person -

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:

"Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business;

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948 (14 of 1948), shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to

apply to that Corporation:

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies create in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements relating to the capital adequacy, creditworthiness, or code of conduct as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for which generation and distribution of electricity,but he shall comply with the measures which may be specified by the Authority under section 53:

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity."

Subsection (b) of section 172 of the 2003 Act reads as under:

(b) all licences, authorizations, approvals,

clearances and permissions granted under the provisions of the repealed laws may, for a period of not exceeding one year from the appointed date or such earlier period, as may be notified by the Appropriate Government, continue to operate as if the repealed laws were in force with respect to such licences, authorizations, approvals, clearances and permissions, as the case may be, and thereafter such licences, authorizations, approvals, clearances and permissions shall be deemed to be licences, authorizations, approvals, clearances and permissions under this Act and all provisions of this Act shall apply accordingly to such licences authorizations approvals, clearances and permissions.

12.0 Learned counsel for the respondent has relied upon the said provisions to contend that the provisions of repealed laws would apply for a period of one year from the date of commencement of the 2003 Act. It is of course true that the repealed provisions would continue to apply in case of necessity, but there is nothing to show that the repealed provisions would only apply and the Act of 2003 will not be applicable during the period of one year. I am of the opinion that the intention of the Legislature is not to continue the new Act for a period of one year from the appointed date, but only to extend the repealed provisions so as to avoid any further complications by change of the Act. However, for the determination of the present case I do not think this Court is required to go into details of this question inasmuch as the determination of other questions would meet the ends of justice in the present case.

12.1 Section 49 deals with agreements with respect to supply or purchase of electricity which includes tariff also. Section 62 of the Act clearly lays down the criteria for determination of tariff which the respondent Board is bound to follow. Section 64 deals with the procedure for tariff order by the Commission and unless amended or revoked, such tariff order shall continue to be in force for such period as may be specified in the tariff order. Learned counsel for the respondent has failed to show anything on record that in pursuance of the agreement, any change in classification has been made in accordance with the provisions of sections 62 and 64.

13.0 From the facts of the case it is clear that the petitioners companies had entered into contract agreement for supply of electrical energy with the respondent Board. The said agreement was arrived at after verifying

the activities carried on at the plant/unit of the petitioners and the same were classified as HTP-I. There is nothing on record to show that from the date of the agreement there was change in the activity of the petitioners so as to change the classification. The bills were issued to the petitioners as per classification HTP-I and the petitioners have paid the same regularly. No dispute was raised in this behalf by the respondent Board at any point of time.

13.1 It is required to be noted that sub-clause 3(a) of Clause 8 of the contract specifically states that notice will be given by either side to other side for change of any of the conditions of the Contract. Admittedly, classification is part of the contract. The respondent has not come out with any case that any notice has been served upon the petitioners before change of classification. Therefore, I am of the opinion that in view of the aforesaid clause it is not open for the respondents to change the classification without hearing the petitioners.

13.2 I have carefully perused the decision cited on behalf of the petitioners in the case of Mardia Chemicals Ltd (supra) as stated hereinabove. The said decision clearly lays down that the Commission has no power to adjudicate any dispute between individual consumer and the Board. Therefore, the contention that the petitioner has alternative remedy by way of approaching the Commission has no substance. It is clear that it is open to the Board for re-determination of Tariff by making an application under section 64 of the 2003 Act and the Commission can revise/modify or amend the tariff after following the procedure as laid down under the Regulations and section 64 of the 2003 Act. I am, therefore, of the opinion that the Commission cannot issue suo motu directions without following the procedure laid down in the Act and Regulations.

13.3 I do not find any substance in the defence raised on behalf of the respondent that there was a mistake committed by them and the bills which were issued to the petitioners were incorrectly issued on the basis of tariff HTP-I. In paragraph 13 of the affidavit in reply filed on behalf of the respondent Board in SCA N-o.1038/2004, it is clearly stated that there is no dispute that the respondent has granted H.T.P. electricity connection of 250 KVA to the petitioners. However, in the same paragraph the respondent states that the respondent has no knowledge regarding the activities carried on by the petitioners. This cannot be believed

inasmuch as it is only after examining the manufacturing activities the classification is made and therefore now it is not open for the respondent to contend that they were not aware about the manufacturing activities of the petitioners. From the record it seems that there is no mistake committed by the respondent because the classification of units in question was arrived at after considering the tariff classification under the tariff orders for the time being in force and since the units in question do not fall under the categories HTP-II(A) or HTP-II(B), the units were classified as HTP-I. Therefore the defence raised by the respondent that there was a mistake is clearly an afterthought. Apart from that no particulars or details are forthcoming as to who committed the alleged mistake, when it was realized and how it remained unnoticed from June 1999 to 2003 even by Audit or Public Accounts Committee and other authorities. No material has been produced to show how the classification was made by the Board in 1987 and on what basis rates under HTP-I and HTP-II were differentiated. In fact, I find that there was no mistake in the contract and this was not pleaded by the respondent Board.

13.4 Another aspect of the matter is that the petitioners have demonstrated that the units in question are manufacturing units and therefore the respondent Board is not justified in classifying and charging the units in question under category HTP-II (A). In any case, even if the argument of the respondent is accepted that they are not manufacturing units, then also without giving an opportunity of hearing to them, the respondent Board was not justified in changing the classification already made earlier. The respondent has failed to show anything on record that before they allegedly categorized the units of the petitioners under category HTP-II(A), they were heard in any aspect of the matter.

13.5 There is also no answer forthcoming from the respondent regarding the plea raised by the petitioners that the respondent has not communicated at any point of time that they propose to effect the change in classification and directly an order was communicated to the petitioners effecting the impugned change in the classification. It is also true that the respondent has neither terminated nor even amended the contract after following the procedure and in accordance with law, which clearly provided that the units in question would be charged as per the applicable tariff for HTP-I category. Therefore, I am of the opinion that without amendment in the agreement the respondent was not justified to charge the tariff under category HTP-II(A). A party cannot

change the terms of the agreement unilaterally, that too without the knowledge of the other side especially when one of the parties is a State.

13.6 On behalf of the respondent Board it is contended that the Commission has, while passing the orders, also confirmed the classification which was done earlier by the respondent Board keeping in HTP-I, only those H.T. consumers having contracted load of 100 KVA and above and who are engaged in manufacturing activities and classifying all other H.T. consumers with contract load of 100 KVA and above in HTP-II(A). Pursuant to the said orders of fixing tariff the respondent Board has published tariff booklet in the year 2001 and in the said booklet vide Clause 11 the rate HTP-II(A) has been mentioned. The classification of tariff HTP-I and HTP-II is the same since the year 1987 and only the tariff rates have been revised from time to time either by the Board or by the Commission as the case may be. From these statements it is clear that except the initial classification, subsequent classification has been done behind the back of the petitioners and without following the proper procedure.

13.7 The respondent has relied upon directions issued by the Commission in its judgement delivered on a petition of M/s Sabic Research and Technology Pvt. Ltd. I am of the opinion that the decision and observations made therein would not help the respondent on the facts of the present case. A perusal of para 14 of the order clearly shows that the directions are specifically for organizations engaged in research availing supply from Board and are not meant for general application to all HTP-I consumers. There cannot be any such general classifications especially when the classification is made after taking into account the manufacturing activities carried out by the individual units. I am of the view that the determination of tariff is a quasi-legislative function, whereas the adjudication of a dispute of applicable tariff is a quasi-judicial function. The dispute decided by the Commission in the aforesaid decision is quasi-judicial decision and therefore though the authority may be clothed with two different functions, it will have to be performed in the respective sphere, and the authority cannot travel beyond the scope of its respective functions. I am of the view that the respondent was not justified in changing the classification of the units in question unilaterally and retrospectively taking recourse to the said decision. In any case, in the decision of the Commission it is nowhere stated that the passing observations made by it would

amount to amendment in the tariff plan. Even if the case of the respondent is accepted then also such change cannot be effected retrospectively as under the Gujarat Electricity Regulatory Commissions Act, 1998 no power is vested with the Commission to effect any determination of tariff retrospectively. Therefore, I am of the considered opinion that the respondent Board has no power to demand the alleged past dues from the petitioners.

13.8 From a plain reading of the order dated 6th January 2004 it is clear that the Executive Engineer of the respondent Board has passed the order without reference to the order of the Gujarat Electricity Regulatory Board and it seems that the order is passed pursuant to the circular from the Head Office of the Board. In my view, such a change is not permissible in view of the contract between the parties and the ratio laid down by this Court in the case of Maradia chemicals Ltd. (supra). The only authority for effecting change is the Gujarat Electricity Regulatory Commission. Even if the Board has jurisdiction, the same cannot be done unilaterally and the appropriate remedy would have been to raise a dispute before the Commission and seek clarification in respect of classification from the Commission.

14.0 As stated hereinabove, I am of the considered opinion that the ratio laid down in the case of Sabic Research & Technology Pvt. Ltd. (supra) will not apply to the facts of the present case inasmuch as no opportunity is given to the petitioners before deciding whether their units fall within the scope of manufacturing unit or not. The respondent Board has on its own, changed the classification from HTP-I to HTP-II(A) without following the proper procedure and such a change is not permissible unilaterally.

14.1 The question whether the petitioners are carrying on manufacturing activity or not cannot be gone into this by this Court. For deciding such question the appropriate authority would be the Commission which can decide such issue if a reference is made by the Gujarat Electricity Board in this behalf.

14.2 I have considered all the decisions cited on behalf of the respondent Board. In view of the peculiar facts of the present case and also in view of the fact that the tariff has been changed without hearing the petitioners, without following the procedure in accordance with law and also because the same has been charged retrospectively, the ratio laid down in those

decisions are not applicable to the facts of the present case.

14.3 Even as per the contract term, the Board could not have changed the term of contract and charged or changed the tariff rate or classification without notice, more particularly, in view of subclause 3(a) of Clause 8 where it has been specifically agreed between the parties that notice will be given by either side for change of any condition of contract.

14.4 The present petitions are allowed only on the ground that the impugned notices were issued contrary to the terms of the contract and the tariff has been revised without jurisdiction and without hearing the petitioners. Therefore, this Court has not gone into the question whether old Act or new Act is applicable to the present case.

15.0 In the premises aforesaid, the petitions are required to be allowed. Accordingly the petitions are allowed. The impugned supplementary bills and demand notices are quashed and set aside. The payment made by the petitioners pursuant to the change of tariff will be adjusted against their future bills. Rule is made absolute accordingly with no order as to costs. It will be open for the respondent Board to revise the tariff rate after following the procedure in accordance with law.

[K.S. JHAVERI, J.]

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